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ALLOCATING TENANT TORT LIABILITY THROUGH THE FIRE INSURANCE POLICY

If real property is destroyed by fire, the holder of the fee must normally bear the loss to the premises, unless there is another party upon whom the loss may be shifted. If the fire which destroys the premises has been caused by a negligent third party, well established principles of

60. IND. ANN. STAT. § 5-104 (Burns 1953).
61. *In re* Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775 (1945).

tort law hold the negligent third party liable for the loss.[1] Within certain limitations the buildings attached to the freehold can be insured for fire or, secondly, a shift in the risk of loss can be accomplished by contracts of indemnity. Thirdly, exculpatory contractual agreements can be used to shift the risk of bearing loss by fire to another person.

Automatically, the responsibility for fire damage to the premises will be shifted to a negligent tenant, if the real property is subject to lease.[2] If the lease contains a clause clearly exculpating the negligent tenant from liability, responsibility for the risk is then shifted back to the lessor. However, many times the intent of the parties to release the tenant from liability is not clearly expressed. For example, the parties may contract to require the tenant to return the premises in as good condition as when demised, "loss by fire excepted." The courts are divided on the effect of this clause when insurance has been effectuated on the premises, most holding that under these circumstances the clause operates as a release of the tenant's liability for a fire which he negligently caused.[3]

Permissible Alterations in Loss Allocation

New Hampshire is the only state which has consistently adopted the strict view of the illegality of exculpatory clauses.[4] Regardless of how

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1. Harper and James, The Law of Torts § 12.1 (1956).

2. As an occupier of land, the tenant is subject to all the usual responsibilities with regard to the exercise of due care. Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953). These must be carefully distinguished from the contractual duties to the landlord, which the lessee may or may not assume, with respect to the care of the premises. 1 American Law of Property § 3.79 (Casner ed. 1952). On the grounds that the clause in the lease relating to the tenant's responsibility toward the premises affected only his contractual relationships with the lessor, the Winkler case, *supra,* refused to find it exculpatory of the tenant's tort liability.

3. For cases releasing the tenant see General Mills v. Goldman, 194 F.2d 359 (8th Cir.), *cert. denied,* 340 U.S. 947 (1950); Hardware Mutual Insurance Co. v. C. A. Snyder, Inc., 137 F.Supp. 812 (W.D. Pa. 1956); Cerny-Pickas Co. v. C. R. Jahn Co., 7 Ill.2d 393, 131 N.E.2d 101 (1955); Kansas City Stockyards Co. v. A. Reich & Son, 250 S.W.2d 692 (Mo. 1952); United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956). *Contra,* Sears, Roebuck & Co. v. Poling, 81 N.W.2d 462 (Iowa 1957); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953). *Cf.* Wichita City Lines v. Puckett, 295 S.W.2d 894 (Tex. 1956) (covenant by lessor to carry insurance does not release tenant from liability for his negligence).

For an earlier comment based on the General Mills decisions see Brewer, *An Inductive Approach to the Liability of the Tenant for Negligence,* 31 B.U.D. Rev. 47 (1951). For representative trade comment see The National Underwriter, Nov. 10, 1949, p. 1.

4. Nashua Gummed & Coated Paper Co. v. Noyes Buick Co., 93 N.H. 348, 41 A.2d 920 (1945) (landlord and tenant); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941) (same); Kenny v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925) (restaurant owner). For a recent case expressing the general view, which recognizes the validity of exculpatory contracts between landlords and tenants see Jackson v. First National Bank of Lake Forest, 415 Ill. 453, 114 N.E.2d 721 (1953). For general discussion see Note, 15 U. Pitt. L. Rev. 493 (1954); Note, 175 A.L.R. 12 (1943).

The Restatement of Contracts has taken the view that exculpatory contracts are not valid to relieve the wrongdoer from liability for wilful wrongdoing. Rest. Contracts

well drafted the exculpatory clause may be, and regardless of how well it expresses the intent of the parties, the New Hampshire courts make it clear that the common law duty to exercise due care may not be contracted away. Exculpatory clauses are claimed to violate New Hampshire's public policy because they induce a want of due care. Several states have at least given token recognition to the New Hampshire view, but the great majority of the states have taken the position that exculpatory clauses can be valid.[5]

In those states recognizing the validity of the exculpatory clause, the courts have explicitly or implicitly sustained the validity of such clauses as a proper exercise of the freedom to contract.[6] However the same majority of the courts declare that such clauses are not favored and should be strictly construed.[7] Even assuming, however, that the strict construction rule can be of real value in deciding a particular case, its application to the problem at hand is by no means certain. Since the meaning of the "loss by fire excepted" clause is not clear, it might well be construed against the one who drafted the lease or who dominated the negotiations, usually the lessor.[8] However, in *Wichita City Lines v. Puckett*[9] the

§§ 574, 575 (1932). For judicial acceptance of this point of view see Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955).

5. Inglis v. Garland, 19 Cal. App.2d 767, 64 P.2d 501 (1936); Barclay, Inc. v. Manfield, 48 A.2d 768 (D.C. Mun. Ct. 1946); King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933); Franklin Fire Ins. Co. v. Noll, 115 Ind. App. 289, 58 N.E.2d 947 (1945); Niederhaus v. Jackson, 79 Ind. App. 551, 137 N.E. 623 (1922); Grady Co. v. Herrick, 288 Mass. 304, 192 N.E. 748 (1934); Commercial Union Assurance Co. v. Foley Bros., 141 Minn. 258, 169 N.W. 793 (1918); Gralnick v. Magid, 292 Mo. 391, 238 S.W. 132 (1921); Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 180 N.E. 245 (1932); Hirsch v. Radt, 228 N.Y. 100, 126 N.E. 653 (1920); Wright v. Sterling Land Co., 157 Pa. Super. 625, 43 A.2d 614 (1945); Wilsonian Investment Co. v. Swope, 180 Wash. 35, 38 P.2d 399 (1934).

6. See note 5 *supra*.

7. A good expression of the majority view on this question will be found in Fox v. Fox Valley Trotting Club, Inc., 4 Ill. App.2d 94, 123 N.E.2d 595 (1954). For two recent interesting cases applying this view to exculpatory clauses in leases see State v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949); Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946). See also Halsted & 79th Bldg., Inc. v. O'Brady, 349 Ill. App. 536, 111 N.E.2d 382 (1953); Marvin Drug Co. v. Couch, 134 S.W.2d 356 (Tex. Civ. App. 1939). In Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953), the strict construction rule was a factor which led the court to refuse to imply an exculpatory clause from a provision in the lease covering the lessee's responsibilities to the lessor with respect to the condition of the premises.

8. See, *e.g.*, Schetter v. United States, 136 F.Supp. 931 (W.D. Pa. 1956); Solomon v. Neisner Bros., 93 F.Supp. 310 (M.D. Pa. 1950). The rules for the construction of a lease are as conflicting as the rules for the construction of any agreement. For cases which do not adopt constructional presumptions but which interpret the lease as a whole, or which attempt to ascertain the "intent" of the parties, see Ingals v. Roger Smith Hotel Corp., 143 Conn. 1, 118 A.2d 463 (1956); Lewis v. Real Estate Corp., 6 Ill. App.2d 240, 127 N.E.2d 272 (1955); Longi v. Raymond Commerce Corp., 34 N.J. Super. 593, 113 A.2d 69 (App. Div. 1955); McCreight v. Girardo, 205 Ore. 223, 280 P.2d 408 (1955).

Texas Supreme Court recently applied another traditional rule and construed an ambiguous exculpatory clause against a tenant who attempted to assert it as a defense.

Perhaps the courts construing the "loss by fire excepted" clause as exculpatory can find in the circumstances of the case an "intent" to relieve the tenant. In all of these cases the loss had been paid and an action was brought against the tenant by an insurer, based on the insurer's right of subrogation. In addition, the lessor had either convenanted to carry insurance, or the tenant had contributed to the insurance premiums.[10] Interestingly enough the older cases in which insurance was not involved did not find similar clauses to be exculpatory.[11] Since intent is nebulous and mainly subjective the courts have some leeway in finding or not finding an "intent" to achieve a certain result. The presence of the insurer as a financially responsible third party could conceivably influence the parties negotiating a lease to exculpate the lessee from his negligent misconduct. On the other hand, the prospect that the lessor would have to bear the entire burden of fire loss where insurance is not carried on the premises, would favor a presumption that the lessor had never intended to exempt the lessee from liability for his negligent acts.[12] Thus the modern trend to find an intent to exculpate the lessee should perhaps be ascribed to the entrance of an insurance company into the picture.[13]

In the recent cases exculpating the tenant the courts have felt entitled to compare the phrase "loss by fire" in the lease with the same phrase in the insurance policy and to give the clause the same meaning in both contexts.[14] Since the phrase "loss by fire" as used in the insurance policy covers loss resulting from a fire negligently caused, the phrase as used in the lease has been given the same meaning. Such comparison might be justified if the lessor and the lessee were aware of the presence of insurance during the lease negotiations, and especially if the

9. 295 S.W.2d 894 (Tex. 1956). *Accord,* Standard Ins. Co. of New York v. Ashland Oil & Refiner Co., 186 F.2d 44 (10th Cir. 1950).

10. Cases cited note 3 *supra.*

11. Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N.W. 557 (1915). See also Porter v. Allen, 8 Idaho 358, 69 Pac. 105 (1902); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 Pac. 939 (1927).

12. See Carstens v. Western Pipe & Steel Co., *supra* note 11. While the absence of insurance was not alluded to, the court noted that the lessor, as a prudent business man, could hardly have intended to release the tenant from his liability for loss negligently caused by him. The inference seems to be that were this intended the lessor would have to assume the entire loss, which is hardly consistent with reasonable business prudence.

13. See General Mills v. Goldman, 194 F.2d 359 (8th Cir. 1950).

14. See, *e.g.,* Cerny-Pickas Co. v. C. R. Jahn Co., 7 Ill.2d 393, 131 N.E.2d 101 (1955); United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956).

tenant contributed to the premiums. Furthermore, because the action was brought by the insurer in these cases the courts might have been more easily led into viewing the lease and policy in pari materia. Yet, it is also significant that clauses relating to the return of the premises have often been viewed as applicable only to the lessee's duty to make repairs.[15] Even if it is assumed that the courts have properly found an intent to exempt the tenant, and have properly construed the "loss by fire" provisions as applicable to any fire negligently caused, the interests of the insurer as a third party to the transaction remain to be considered.

EXCULPATORY CLAUSES AND THEIR EFFECT ON INSURANCE

THE TENANT AS A NAMED INSURED

The tenant can have an insurable interest in the demised premises,[16] either because of the presence of improvements on the property[17] or because of an agreement on his part to keep the premises insured against certain perils.[18] Moreover, the tenant has an insurable interest in his own liability for negligence.[19]

Even though the tenant has an insurable interest in the demised premises or in his liability, this should not mean that he is entitled to the advantage of insurance not taken out in his own name.[20] A contract of fire insurance is a personal contract and not a contract *in rem.*[21] It does

15. For an Indiana case, which is typical, see Burdick Tire & Rubber Co. v. Heylmann, 79 Ind. App. 505, 138 N.E. 777 (1923). *Compare* Dehn v. S. Brand Coal & Oil Co., 241 Minn. 237, 63 N.W.2d 6 (1954); Anderson v. Ferguson, 17 Wash.2d 262, 135 P.2d 302 (1943).

16. See, *e.g.*, Getchell v. Mercantile & Manufacturer's Mutual Fire Ins. Co., 109 Me. 274, 83 Atl. 801 (1912). For a general explanation see VANCE, INSURANCE § 28 (3rd ed. 1951).

17. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. 29, 180 N.W. 997 (1921); Berry v. American Central Insurance Co. of St. Louis, 132 N.Y. 49, 30 N.E. 254 (1892).

18. Kahn v. American Ins. Co., 137 Minn. 16, 162 N.W. 685 (1917); Lawrence v. Insurance Co., 43 Barb. 479 (N.Y. 1865); Imperial Fire Ins. Co. v. Murray, 73 Pa. 13 (1873).

19. Hawkeye-Security Insurance Co. v. Presbitero & Sons Inc., 209 F.2d 281 (7th Cir. 1954); Ocean Accident & Guarantee Corp. Ltd. v. Bear, 220 Ala. 491, 125 So. 676 (1929).

20. This principle was recently applied in Spires v. Hanover Fire Ins. Co., 166 Pa. Super. 52, 70 A.2d 828 (1950), in a case in which the lessor had purchased insurance from the defendant company and had named the tenant as the beneficiary. Subsequently, the property subject to the lease had been destroyed by fire. Although the insurance had been taken out for the tenant's benefit, his suit against the insurer on the policy was denied on the grounds that a contract of indemnity is personal. See also Currier v. North British Co., 98 N.H. 366, 101 A.2d 266 (1953); Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242, 29 A.2d 121 (1942); Travelers Fire Ins. Co. v. Steinman, 276 S.W.2d 849 (Tex. Civ. App. 1955).

21. Shadgeth v. Philips & Crew Co., 131 Ala. 478, 31 So. 20 (1901); Seaboard Fire & Marine of N.Y. v. Keys, 224 Ark. 629, 275 S.W.2d 640 (1955); Nardyke & Marmon Co. v. Gery, 112 Ind. 537, 13 N.E. 683 (1887); Rent-A-Car Co. v. Globe &

not insure the property, nor does it even run with the land unless this is expressly stipulated. Unless the policy names the tenant, it does not extend to him even though the lease requires the tenant to keep the buildings insured against fire.[22]

In the cases exculpating the tenant, in which insurance was involved, the tenant could also escape his common law liability for negligence if he could be considered an additional insured under the policy. This possibility has not been expressly considered in the cases.[23] Perhaps the tenant could be said to be an additional insured in those instances in which he paid the premiums either directly or indirectly by way of rent money or, alternatively, in those instances in which the lessor had convenanted to carry fire insurance. Practically speaking, it would seem that any and all lease agreements could be said to include insurance premiums in the rental whether or not the contracting parties contemplated such an inclusion.[24] However, if an increased rental is given in consideration for an exculpatory clause the intent of the parties is even more clearly expressed and so these cases can be distinguished from those instances in which no such increase has occurred.[25]

Rutgers Fire Ins. Co., 158 Md. 169, 148 Atl. 252 (1930); Wilmuth v. National Liberty Ins. Co., 239 Mo. App. 1199, 206 S.W.2d 730 (1947); Stevens v. Stock, 101 Mont. 509, 55 P.2d 7 (1936).

22. See Spires v. Hanover Fire Ins. Co., 166 Pa. Super. 52, 70 A.2d 828 (1950). However, it might be possible, in a case of this type, for the lessee to go into equity to protect his interest in the policy. For example, he might enjoin the insurer from paying the proceeds of the policy to the lessor, or he might impress the proceeds with a trust in his behalf. Klefstad v. American Central Ins. Co., 207 F.2d 288 (7th Cir. 1953); Hanson v. W. L. Blake & Co., 155 Fed. 360 (D.C. Me. 1907); National Bank v. Union Ins. Co., 88 Cal. 497 (1891); Nordyke & Marmon Co. v. Gery, 112 Ind. 537, 13 N.E. 683 (1887); Aetna Ins. Co. v. Thompson, 68 N.H. 20 (1894); Erie Brewing Co. v. Ohio Farmers Ins. Co., 81 Ohio St. 1, 89 N.E. 1065 (1909); Thorp v. Crote, 79 Vt. 390, 65 Atl. 562 (1907). However, the action in equity will not affect the insurer's rights of subrogation against a negligent tenant since the availability of an equitable remedy does not alter the status of the tenant under the contract in an action at law. See Klefstad v. American Central Ins. Co., *supra*.

23. See the cases cited in note 3, *supra*.

24. See the discussion in General Mills v. Goldman, 194 F.2d 359 (8th Cir. 1950).

25. See Kansas City Stockyards Co. v. A. Reich & Sons, 250 S.W.2d 692 (Mo. 1952). If it could be determined that the real rationale of any decision exempting the tenant from liability was that the tenant was an additional insured, and not the validity of the exculpation clause, such a decision could be challenged on the grounds that the insurer has the privilege to select his insured (for the latter proposition see, *e.g.*, Travelers Fire Ins. Co. v. Steinman, 276 S.W.2d 849 (Tex. Civ. App. 1955). See also State Mutual Fire Ins. Co. v. Roberts, 31 Pa. St. 438 (1858), noting that the risk position of the insurer is dependent on the integrity, good faith, and habits of carefulness of the insured.

TENANT EXCULPATION AND THE INSURER'S RIGHT OF SUBROGATION

Subrogation is a principle of equity and arises by operation of law.[26] Provided the insurance contract is one of indemnity, it is not mandatory that a subrogation clause be expressed.[27] The principle of subrogation is that the insurer, on payment of the claim to the insured, has a right to recover from a third person who has negligently caused the loss paid under the policy.[28] In the cases exculpating the tenant the insurer had sued him directly. But, because the tenant was exculpated, the insurer's right of subrogation was held to have been destroyed.

Furthermore, in these cases payment was made to the insured, and this operated as a waiver of any possible breach of the subrogation clause in the policy.[29] No doubt the ambiguity in the leases in question contributed to this apparent lack of caution on the part of the insurance companies. Because the policy defense had been waived, the courts did not consider the policy breach problem in more detail.[30]

Before the adoption of the New York Standard Fire Insurance

26. See, *e.g.*, American Automobile Fire Ins. Co. v. Speiker, 97 Ind. App. 533, 187 N.E. 355 (1933). See BESPHAM, PRINCIPLES OF EQUITY § 310 (11th ed. 1931).

27. See, *e.g.*, Castellain v. Preston, 11 Q.B.D. 380 (1883). The doctrine is based on public policy as well as principles of equity. See also RESTATEMENT, RESTITUTION § 76 (1937). The wrongdoer cannot defend on the grounds that the one who suffered injury has been reimbursed by the insurer. Williams v. Purity Bakeries of Indiana, Inc., 101 Ind. App. 441, 193 N.E. 717 (1935); Florence v. D.L. & W.R.R. Co., 258 Pa. St. 456, 102 Atl. 133 (1917).

28. Generally, the insurer can claim the benefit only of those rights derived from the insured. In the usual parlance, he stands in his shoes. *E.g.*, St. Louis, Iron Mountain & Southern Ry. Co. v. Commercial Union Ins. Co., 139 U.S. 223 (1891). In rare instances, the general principle has been disregarded. For example, in Grimes v. American Heating Co., 188 Miss. 577, 191 So. 819 (1939), a school district had entered into a contract with a heating company to install a heating system in one of the school buildings. The agent for the heating company negligently set fire to the building. To the subrogation suit brought by the insurance company the heating company defended on the ground that the insurer could have no rights higher than those of the insured. Since the school district lacked the capacity to maintain such a cause of action, it was contended that the insurer was likewise limited. However, the court rejected this contention and allowed the insurance company to sue. It noted that a contrary construction would place the schools at a disadvantage in securing insurance. Similar considerations have not been mentioned by the courts denying the insurance company its rights to subrogation in the cases in which the courts construed the "loss by fire excepted" clause as exculpatory.

29. See, *e.g.*, Weaver v. New Jersey Fidelity & Plate Glass Co., 56 Colo. 112, 136 Pac. 1180 (1913) (insurer, having knowledge of settlement with third party, paid insured). See also Poole v. Wm. Penn Fire Ins. Co., 246 Ala. 62, 84 So.2d 333 (1955); 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 2150 (1931).

30. See cases cited note 3 *supra*. The insurance companies might possibly have denied the claims and elected to defend their failure to pay on the theory that the release of the tenant's liability breached the subrogation clause. The success of this defense would depend on the language of the subrogation clauses in the policies involved, and the language is not given in the cases. However, public relations may well have dictated that the insurance companies not follow such a course.

Policy[31] many forms were used.[32] One common form provided that in case of loss the insurance company was to be subrogated to all of the "claims" of the insured. Under this form the courts voided the policy whenever the insured contracted away his cause of action against a third party, even if he did so before the loss occurred.[33] The courts reasoned that the presence of a "claim" was not dependent on the occurrence of a loss but existed regardless. Under the New York Standard Fire Insurance Policy, which is now in common use, the insurer is subrogated to any "rights" of the insured.[34] Two theories have been advanced as to when the "right" of subrogation vests. One theory is that the right of subrogation vests contingently with the insurer when the loss occurs and the duty to pay the insured has arisen. The other is that the right vests, not upon the duty to pay, but upon the actual act of payment.[35] A close analysis of the problem indicates that although the insurance company may not be able to press for reimbursement against a wrongdoer before it has paid the loss, nevertheless, the courts will protect the carrier before it has made a payment to its insured if a release is executed after the loss has occurred but before payment. Once the loss occurs, a discharge of the wrongdoer by the insured will discharge the insurer "pro tanto."[36]

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31. The lack of uniformity in contracts of indemnity during the nineteenth century brought about statutory attempts aimed at requiring uniformity. Earlier attempts, such as that of the Connecticut legislature in 1867, were not successful until the New York legislature passed an act in 1886 requiring the New York Board of Fire Underwriters to prepare a uniform policy of insurance. The policy prepared was widely adopted in almost all other states. Those states that have not adopted the New York form have adopted the Texas Standard Fire Insurance Policy. This development is outlined in GOLDIN, PRINCIPLES OF THE NEW YORK STANDARD FIRE INSURANCE POLICY (1938).

32. See, *e.g.*, Hartford Fire Ins. Co. v. Payne, 195 Iowa 1008, 203 N.W. 4 (1925) (policy voided if insured deprives insurer of right of subrogation); Bloomingdale v. Columbia Ins. Co., 84 N.Y. Supp. 572 (Sup. Ct. 1903) (insured not to enter into any agreement to release carrier of statutory or common law liability); Niagara Fire Ins. Co. v. Fidelity Title & Trust Co., 123 Pa. St. 516, 16 Atl. 790 (1889) (insured to assign cause of action to insurer on payment of the loss).

33. Carstairs v. Mechanics & Traders Ins. Co., 18 Fed. 473 (C.C. Md. 1883). *Compare* Fayerweather v. Phenix Ins. Co., 118 N.Y. 324, 23 N.E. 192 (1890); Missouri Pacific R. Co. v. International Marine Ins. Co., 84 Tex. 149, 19 S.W. 459 (1892).

34. "This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this company." N.Y. INSURANCE LAW § 168(6).

35. 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 2020 (1931). See Phenix Fire Ins. Co. v. Virginia-Western Power Co., 81 W. Va. 298, 94 S.E. 372 (1917).

36. American Surety Co. of N.Y. v. Palmer, 240 N.Y. 63, 147 N.E. 359 (1925); Weber v. United Hardware & Implement Mutual Co., 75 N.D. 581, 31 N.W.2d 456 (1948); First National Bank of Charleroi v. Newark Fire Ins. Co., 118 Pa. St. 582, 180 Atl. 163 (1935). See also Packham v. German Fire Ins. Co. of Baltimore, 91 Md. 334, 46 Atl. 1066 (1900); Camden Fire Ins. Assn v. Blum, 132 Misc. 22, 227 N.Y. Supp. 746 (City Ct. 1928). These cases should be distinguished from those in which conduct on the part of the insured discharges the substantive cause of action against the wrongdoer. Knight v. Calvert Fire Ins. Co., 268 S.W.2d 53 (Mo. App. 1954) (insured's suit against wrongdoer dismissed with prejudice).

It is not clear that the insurer will be discharged under the New York form if the right of subrogation is released before the loss.[37] Here it may be crucial to determine which was executed earlier, the release or the policy. If the release is executed before the contract of insurance, the insurer might claim that the failure to disclose the release is an act of fraud or misrepresentation on the part of the insured. But the courts have held that there is no duty on the prospective insured to inform the insurer of the previously executed release, since the insurer upon inquiry could have been informed.[38] If the insurer makes inquiry and the insured misrepresents the true situation, fraud is committed. A policy of insurance procured by fraud is voidable.[39] Whether a release of the right of subrogation before the loss, but after the execution of the policy, operates as a release of the insurer has not been finally determined, and the facts in the cases under consideration do not always indicate when the policies in question were executed.

An answer to the problem just raised is difficult to find in view of the paucity of decisions on this point. Two possible theories might be used by the insurance company in such cases to defend a suit on the policy. One court which held the insurer liable in a case in which the release of liability antedated the policy reasoned that the carrier took only the potential rights of the insured when the policy was executed.[40] This decision could be taken to mean that, if the insured has not executed a release prior to the date of the policy, the insurer has secured an interest in the insured's potential claims against others. If this is so, then the insured cannot bargain it away without breaching the subrogation clause of the policy.[41]

37. For an unsupported statement that a release of the wrongdoer's liability will void the policy whether executed before or after the loss see VANCE, INSURANCE p. 786 (3rd ed. 1951). The language in the cases in which the wrongdoer was released after the loss is broad enough to apply in both contexts. Pacific Fire Ins. Co. v. Pennsylvania Sugar Co., 72 F.2d 958 (3rd Cir.), *cert. denied*, 293 U.S. 623 (1934); Harter v. American Eagle Fire Ins. Co., 60 F.2d 245 (6th Cir. 1932); Auto Owners Protective Exchange v. Edwards, 82 Ind. App. 558, 136 N.E. 577 (1922); Sims v. Mutual Fire Ins. Co., 101 Wis. 59, 77 N.W. 908 (1899).

38. Gerlach v. Grain Shippers' Mutual Fire Ins. Assn, 156 Iowa 333, 136 N.W. 691 (1912); Jackson Co. v. Boylston Mutual Ins. Co., 139 Mass. 508, 2 N.E. 103 (1885); Ensel v. Lumber Ins. Co., 88 Ohio St. 269, 102 N.E. 955 (1913); Pelzer Mfg. Co. v. Sun Fire Office, 36 S.C. 213, 15 S.E. 562 (1892).

39. For a general discussion see 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 2151 (1931).

40. Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S.E. 562 (1892). See also Gerlach v. Grain Shippers' Mutual Fire Ins. Assn, 156 Iowa 333, 136 N.W. 691 (1912); Ensel v. Lumber Ins. Co., 88 Ohio St. 269, 102 N.E. 955 (1913).

41. There is a suggestion in Northwestern Fire & Marine Ins. Co. v. Fred T. Ley & Co., 149 Misc. 76, 266 N.Y. Supp. 173 (Sup. Ct. 1932), that a release of the wrongdoer after the issuance of the policy but before the loss would release the insurer. The case involved a suit by the company to recover from its insured the payment it had

Although the insurance contract does not employ words of suretyship, many early opinions adopted such an analogy. If such an analogy is correct the following well-established rule of suretyship law applies: When the creditor (insured) unconditionally releases the principal (tortfeasor) without the consent of the surety (insurer) this discharges the surety (insurer) because the release destroys the right of subrogation.[42] The insurance contract-suretyship analogy was used in *Dilling v. Draemal.*[43] This case involved a release of the right of subrogation by the insured after the loss and after the date of the policy. The court adopted a position with regard to the policy of insurance which would apply to the release of subrogation before the occurrence of the loss and which would indicate that a release at such a time would also void the policy.

In view of the uncertain state of the authorities, the cases exculpating the tenant cannot be said to be incorrectly decided to the extent that they indicate that the release of the tenant's liability does not breach the policy. This is especially true because the insurer in all of these cases paid the losses, thereby waiving their rights arising upon breach.[44] Furthermore, it is not clear whether the release of the tenant was executed before or after the execution of the policy. Therefore, until an insurance company claims a forfeiture of the policy based on the execution of a clause exculpatory of the wrongdoer which antedates the loss but is subsequent to the issuance of the policy, the resolution of the forfeiture problem presented by these circumstances must remain unsettled. Nevertheless, the failure of the decisions squarely to meet the problem of policy breach may be significant. If these decisions are inconsistent with the law of subrogation, it would appear they can be rationalized only on the premise that the traditional tort liability of the tenant for his own negligence or the traditional judicial reluctance to permit the contracting away of one's own negligence has been altered in cases of this type.

Social Effects

Though the decisions exculpating the tenant may represent a departure from conventional principles of tort law, they can be defended if they represent a desirable social policy and if they do not have harmful economic effects. There is no question but that the effect of these cases is to redistribute responsibility for culpability which had previously

made under the policy. Apparently the suit failed because the insurer had compromised and reduced the claim with knowledge of the wrongdoer's release. Or, in this case, the voluntary payment to the insured may have estopped the insurance company. Weaver v. New Jersey Fidelity & Plate Glass Co., 56 Colo. 112, 136 Pac. 1180 (1913).

42. *E.g.*, Morton v. Dillion, 90 Va. 592, 19 S.E. 654 (1894).

43. 16 Daly 104, 9 N.Y. Supp. 497 (C.P. N.Y. 1890).

44. See 8 Couch, Cyclopedia of Insurance Law § 2150 (1931).

been assumed on an individual basis. This is accomplished by placing the risk of loss on the insurer without recourse, thereby converting the fire insurance policy into a liability policy.

This result can be viewed in light of the social policy thought to be dominant in tort law and in light of any adverse consequences which might result to the insurance companies. Perhaps the cases relieving the tenant of liability should be criticized for removing a deterrent to wrong conduct. But it has been indicated that the exculpatory clause is not inconsistent with tort law to the extent that it seeks to exonerate the wrongdoer. Provided that the ambiguities in the clause under consideration have been properly resolved, the cases are not objectionable on this score. However, since the tenant could himself have obtained a liability policy, perhaps the courts have not been fair to the insurance companies by converting, in effect, an indemnity policy into a liability policy on the tenant's behalf.[45]

The additional hazard clause is relevant at this point, since the argument can be made that the release of the tenant without notice to the insurer increases the hazard to such a degree that it is a breach of this covenant and voids the policy. However, the courts interpret such clauses strictly against the insurer and require that the increase in the hazard be the proximate cause of the damage.[46] To prove this the insurer would have to show that the tenant in fact created a hazard additional to that created by the insured and, further, that the absence of the deterrent of tort responsibility operated to contribute to the casualty. In the case where the lease antedates the policy the insurer's case might be further

45. For a similar approach in the context of "proximate cause" see Ryan v. New York Central R.R. Co., 35 N.Y. 210 (1866).

46. The cases hold that the increase in the hazard must be the proximate cause of the damage if the insurer is to use this breach successfully as a defense. Colker v. Connecticut Fire Ins. Co., 218 Ky. 124, 290 S.W. 1073 (1927); Taverna v. Palatine Ins. Co., 228 App. Div. 33, 238 N.Y. Supp. 389 (4th Dep't 1930); Filardo v. National Union Fire Ins. Co., 224 App. Div. 136, 229 N.Y. Supp. 682 (4th Dep't 1928); Bowling v. Continental Ins. Co., 86 W. Va. 164, 103 S.E. 285 (1920). As might be expected, the courts interpret the additional hazard clause strictly against the insurer. Goldman v. Piedmont Fire Ins. Co., 198 F.2d 712 (3rd Cir. 1952) (clause doesn't work forfeiture but merely suspends insurance while hazard unabated).

A continuing condition affects the hazard of it makes the occurrence of a fire more or less likely. For example, a change of tenants can affect the desirability of the risk. American Alliance Ins. Co. v. Pyle, 62 Ga. App. 156, 8 S.E.2d 154 (1940); Washington Mutual Ins. Co. v. Manufacturers & Merchants Mutual Ins. Co., 5 Ohio St. 450 (1856). If it could be shown that the presence of an exculpatory clause in the lease tended to reduce a tenant's standard of care an additional hazard might be created which would void the policy. *Cf.* Syndicate Ins. Co. v. Bohn, 65 Fed. 165 (8th Cir. 1894); Davenport v. Firemen's Ins. Co., 47 S.D. 426, 199 N.W. 203 (1924); Nemojeski v. Bubolz Mutual Town Fire Ins. Co., 271 Wis. 561, 74 N.W.2d 196 (1956). But proof of this type might be difficult for the insurer to secure. Patriotic Ins. Co. v. Franciscus, 55 F.2d 844 (8th Cir. 1932).

weakened by the fact that he was on inquiry of the tenant's presence. But if the tenant constituted a risk which the insurer would not have insured or would have insured only at a higher rate, a defense under the additional hazard clause, though difficult, may not be impossible.

Suggestions for Better Allocation of Tort Liability

In their reliance on the consensual elements in the transactions involved, those opinions exculpating the tenant point the way toward a private adjustment of risk-bearing in the lease situation which can be fair to all of the parties concerned. First, if the insurer finds that it has been asked to write a policy on premises covered by a lease which is ambiguous as to the tort responsibility of the tenant, it should, if it does not refuse to underwrite the risk, insist on declaratory judgment proceedings to clarify the lease (which may not be practical) or on a rewriting of the lease which will clearly set out the intent of the parties.

If a lease ambiguous as to the tenant's exculpation is executed subsequent to the date of the policy, the insurer is in a position to claim that it constitutes a material breach of the subrogation clause. In this event the insurer must be overly careful not to waive its policy defense. Failure promptly to return the entire premium earned from the date of the effectiveness of the lease can be a waiver of the alleged breach of the policy.[47] In this connection the insurer must be diligent in discovering any facts, such as an increase in the premium rate, which might be held to have put it on inquiry of a change in occupancy and thus of the terms of any agreements which may have been executed by the insured.[48]

When entering into leases, the parties can give proper consideration to the interests of all concerned in the contingency of a fire loss:

(1) The tenant can be named as an insured in the contract of insurance, in which event the insurer protects the tenant's insurable interest as well as the lessor's. In this event the insurer is prevented from maintaining a subrogation action against the tenant. But there may be drawbacks to this arrangegment in the case of multiple occupancy structures where the tenant frequency is high. The insurer may not wish to consent to a clause naming all present and future tenants as additional insureds, and a reassessment of the policy every time there is a change in occupancy may be impractical. Furthermore, if this method alone is used,

47. Vance, Insurance, pp. 489-91 (3rd ed. 1951). See Mackaman, *Subrogation: A Landlord-Tenant Problem,* 4 Drake L. Rev. 79, 81 & n. 9 (1955) for a solution to the problem involving a waiver of subrogation clause. It appears, however, that this clause is not available as a standard clause to the general public. Letter in file in Business Office of Indiana Law Journal from Department of Insurance, State of Indiana.

48. Vance, *op. cit. supra* note 50, at 495, 496.

the tenant is not protected from suits by the lessor for damage not covered by the insurance. To relieve the tenant of all potential liability a clause is needed clearly exculpating the tenant from all liability in tort.

(2) The tenant can ask the insurer to agree to the exculpatory clause, so that the contract of insurance will not be voided. This would protect the tenant from subrogation suits, and the exculpatory clause can be broadly written to excuse the tenant from all liability in tort. However, this approach would also be subject to difficulties in the case of a multiple occupancy structure.

(3) The tenant can purchase legal liability insurance to the appropriate limits of liability.

(4) Perhaps the safest approach would be a combination of all three suggestions. Where practicality permits, the parties can adopt a broad exculpatory clause in the lease and include the tenant as a named insured in the policy. When it would be impractical to name the tenant as an insured the tenant could carry adequate limits of legal liability insurance and the exculpatory clause could be limited to the uninsured interest of the lessor. Quite properly, either party could insist that the arrangement made as to the insurance be reflected in the rent price. For example, the lessor could insist that the lessee contribute toward the insurance premiums as the price of added protection if he is named in the policy.

Whatever solution is adopted, it seems only fair to the insurer that it be advised of a release of liability if a lease containing an exculpatory clause is executed subsequent to the policy of insurance. This will place the tenant in a consensual relation with the insurer and will give the insurer an opportunity to accept or reject the tenant as an insured or to adjust the rate accordingly if additional hazard is shown.